Supreme Court, U.S.
FILED
AUG 11 1993
OFFICE OF THE CLERK

No. 92-1890

In The

Supreme Court of the United States

October Term, 1993

RENTON SCHOOL DISTRICT NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, by and through his next friend, Peggy Smith, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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Respondents contend that this Court should deny certiorari because they assert that any conflict between the Equal Access Act and the Washington Constitution is "entirely speculative" (Resp. Br. 2) and the question presented by the Petition for Writ of Certiorari is "purely hypothetical" (*id.* at 9-10). As demonstrated in the Petition for Writ of Certiorari, and as will be discussed below, Respondents simply are wrong.

As Judge Farris correctly acknowledged in his Concurring Opinion,[1] and contrary to Respondents' erroneous contention, Petitioners' (and the District Court's) interpretation of the Washington Constitution is neither "highly implausible" nor "absurd." (Resp. Br. 9) The question of whether the Equal Access Act *implicitly* preempts the Washington Constitution is exceptionally important and one of first impression that should be resolved by this Court.

1. The conflict between the Equal Access Act and the Washington Constitution presents an actual controversy and is not "speculative" nor is the question presented "hypothetical."

Respondents erroneously contend that the conflict between the Equal Access Act and the Washington Constitution is "entirely speculative" (Resp. Br. 2) and also that the Petition for Writ of Certiorari raises "an entirely hypothetical question" (*id.* at 9). It is clear from Judge Farris' Concurring Opinion that the conflict between the Act and the Washington Constitution is not speculative, and the following question presented by the Petition is anything but hypothetical:

> Where the Equal Access Act does not expressly preempt state constitutions, does it *implicitly* preempt the Washington constitutional provisions that repeatedly have been construed by the Washington Supreme Court to absolutely

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[1] The Ninth Circuit's Opinion, by Judge Farris, is *Garnett v. Renton School Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993) (Pet. App. A). The Concurring Opinion of Judge Farris is at 987 F.2d 646-48 (Pet. App. A-14-17).

> prohibit *any* entanglement between public schools and religion and that were construed by the District Court in this matter to preclude Respondents' religion club from meeting at a Washington public high school?

That question needs to be resolved by this Court because there can be no doubt that, as Judge Farris observed in his Concurring Opinion (987 F.2d at 647; Pet. App. A-15-16), the Washington Supreme Court repeatedly has construed the Washington Constitution to bar the type of entanglement sought by Respondents. Indeed, as Judge Farris noted, in *Witters v. Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119, 1122 n.11, *cert. denied*, 493 U.S. 850 (1989), the Washington Supreme Court cited with approval the District Court's interpretation of the Washington Constitution *in this matter*. Furthermore, as noted in the Petition (at p. 7) and also in the Ninth Circuit's Opinion (987 F.2d at 646; Pet. App. A-12) and Respondents' Brief (p. 6 n.4), the question raised in the Petition is likely to recur because of similar constitutional provisions in a number of other states.

2. The Ninth Circuit did not base its decision on an express preemption of the Washington Constitution by the Equal Access Act but instead on an implied preemption.

Respondents are manifestly wrong in asserting that "[t]his is a case of express preemption." (Resp. Br. 3 n.1) The Ninth Circuit expressly ruled that "[t]he [Equal Access Act] does not explicitly preempt state law." (987 F.2d at 644; Pet. App. A-8) The Ninth Circuit's Opinion leaves no doubt that the basis for its decision was an

implicit preemption of the Washington Constitution by the Equal Access Act.

Respondents assert that the Supremacy Clause makes clear that state constitutional law is susceptible to federal preemption and that Petitioners cite no authority that examines the legitimacy of federal statutory preemption of state constitutional provisions. (Resp. Br. 8) Petitioners cited no such authority because, as the Petition for Writ of Certiorari makes clear, Petitioners are not questioning the legitimacy of the doctrine of preemption in general.

The issue that this Court should review is whether the Equal Access Act *implicitly* preempts the Washington Constitution. Respondents ignore this Court's decision in *Northwest Pipeline v. Kan. Corp. Com.*, 489 U.S. 493 (1989), in which the Court ruled that federal law preempts state law under the Supremacy Clause only in certain situations, none of which is present in this matter:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

Id. at 509.[2]

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[2] Respondents assert (at Resp. Br. 3-7) that Petitioners (and the District Court) put misplaced reliance on Sections 4071(d)(5) and (7) of the Equal Access Act as evidence that Congress did

3. Petitioners' and the District Court's interpretation of the Washington Constitution is both plausible and correct.

Respondents contend that Petitioners' (and the District Court's) interpretation of the Washington Constitution is "highly implausible" (Resp. Br. 9), that there is no basis for Petitioners' "extraordinary claim" that to allow Respondents' religion club on the public high school campus would violate the Washington Constitution (*id.*), and that Petitioners (and the District Court), in interpreting the Washington Constitution as they do, "take the idea to the point of absurdity" (*id.*). Respondents' hyperbole notwithstanding, even Judge Farris (who authored the Ninth Circuit's Opinion) in his Concurring

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not intend for the Equal Access Act to comprehensively occupy an entire field of regulation and specifically referred in those sections to the continuing effectiveness of state laws and constitutional rights. For the reasons discussed in the Petition (at pp. 10, 11 n.6), Petitioners believe that Congress did not intend the Equal Access Act to preempt a state constitution like Washington's. In that same regard, Respondents' reliance on *Alverado v. Washington Public Power Supply*, 111 Wash. 2d 424, 799 P.2d 427 (1988), is misplaced because the Washington Supreme Court based its decision in that case on a decision of this Court where the Court concluded unequivocally that the entire field of nuclear safety concerns was preempted by the federal law and that there was simply no room for the application of state law to matters affecting nuclear safety. As discussed at pages 16-17 of the Petition, that is not the case regarding public education, a field that traditionally has been occupied comprehensively by the state.

Opinion clearly expressed his agreement with the interpretation of the Washington Constitution advanced by Petitioners and the District Court:

> Judge McGovern [the District Court Judge] concluded that the Washington State Constitution bars religious student groups from meeting on public high school campuses. I agree.

(987 F.2d at 646; Pet. App. A-14)

While Judge Farris joined the majority of the Ninth Circuit "only because I am equally convinced that Congress intended to preempt state law" (*id.*), he devoted the balance of his Concurring Opinion to explaining why he is "satisfied that Judge McGovern properly concluded that the Washington State Constitution prohibits the relief requested by [Respondents]." (987 F.2d at 647; Pet. App. A-15) In doing so, Judge Farris carefully surveyed and discussed several decisions of the Washington Supreme Court that support Petitioners' and the District Court's interpretation of the Washington Constitution in this matter.

4. Contrary to Respondents' contention, there are no "free speech rights on public property" involved in this matter.

Respondents erroneously contend that their club's activities involve "free speech rights on public property, without official preference or endorsement." (Resp. Br. 6, 9) Respondents obfuscate the issue before this Court. Indeed, Judge Farris noted in his Concurring Opinion that there are no "free speech" rights involved here, as the Washington Constitution "does not bar an open

exchange of ideas [but] merely restricts 'religious' groups from meeting on school grounds." (987 F.2d at 647; Pet. App. A-17)

Respondents also mislead this Court in asserting that the activity of their religion club would be "without official preference or endorsement" of School District officials. (Resp. Br. 9) Respondents ignore the undisputed fact that all of the student clubs that Petitioners allow on their school campus meet pursuant to a formal School District Policy and as officially recognized and formally authorized student clubs. On that basis, Judge Farris, in his Concurring Opinion, stated his agreement with the District Court's ruling that the Washington Constitution would be violated if Respondents' religion club were allowed to meet on the campus:

> [Respondents' religion club] requests a much more substantial use of school facilities and funds than that allocated [and rejected by the Washington Supreme Court] in *Perry [v. School District No. 81*, 54 Wash. 2d 886, 344 P.2d 1036 (1959)]. The . . . Court [in *Board of Education v. Mergens*, 496 U.S. 226 (1990),] held that the [Equal Access Act] requires schools to permit student religious groups to meet on the same terms as other student groups that are part of the limited open forum. 496 U.S. at 247. Therefore, [Petitioners] must allow the student religious group "access to the school newspaper, bulletin boards, the public address system, and the Annual Club Fair," *id.*, if the school permits other student groups to do the same. The school would need to assign a teacher to each meeting of the student religious club for custodial purposes. The Washington Supreme Court flatly

> rejected a more minimal use of the school facilities and personnel in *Perry*. Moreover, the Washington Supreme Court cited with approval the District Court's interpretation of the Washington Constitution in *Garnett [v. Renton School District No. 403*, 675 F. Supp. 1268 (W.D. Wash. 1987)]. *Witters v. Comm'n for the Blind*, [*supra*].

(987 F.2d at 647; Pet. App. A-16)

Judge Farris, in his Concurring Opinion, concluded that "there is a sound basis for the barrier erected by . . . the Washington State Constitution." (987 F.2d at 647; Pet. App. A-16-17) He lamented the intrusion of the Court's decision on state sovereignty and the ability of a state "to maintain a sturdier wall between church and state than the barrier recognized by [this] Court." (987 F.2d at 648; Pet. App. A-17)

Conclusion

The Petition for Writ of Certiorari does not present a "purely hypothetical problem." (Resp. Br. 10) The Petition presents a question of exceptional public importance that is likely to recur in other states with similar restrictive constitutional provisions barring religious meetings on public school grounds. This Court should grant certiorari to decide whether Congress, in enacting the Equal Access Act, meant to preempt those state constitutional provisions and intrude upon the sovereign power and comprehensive authority of Washington and other states with

similar constitutional provisions to prescribe and control the conduct of public schools.

DATED: August 11, 1993.

Respectfully submitted,

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